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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 216, 223, and 224**

**[Docket No. 150727648-6720-01]**

**RIN 0648-BF31**

**Technical Amendments and Recodification of Alaska Humpback Whale Approach Regulations**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, NMFS, are making technical amendments to and recodifying Alaska humpback whale approach regulations within the Code of Federal Regulations (CFR) with only minor, technical revisions. Specifically, we are recodifying the regulations that apply to “Endangered Marine and Anadromous Species” so that they also appear in “Threatened Marine and Anadromous Species”. This action is necessary to reflect the change in the Endangered Species Act (ESA) listing status of humpback whales, whereby some populations of humpback whales will now be classified as endangered species and one will be classified as a threatened species. In addition, we are adding the Alaska approach regulations to the regulations governing the taking and importing of marine mammals under the Marine Mammal Protection Act (MMPA) to clarify that protections are in effect for all humpback whales that may occur in or transit through the waters surrounding Alaska, including those that are not ESA-listed. This clarification reflects that the approach regulations were originally adopted under the MMPA as

well as the ESA. We are also making minor changes to the language of the existing regulations to modernize language and update citations to relevant authorities.

**DATES:** This final rule is effective [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Shannon Bettridge, Office of Protected Resources, 301-427-8402, *Shannon.Bettridge@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

On May 31, 2001, we issued a final rule (66 FR 29502) applicable to waters within 200 nautical miles (370 km) of Alaska that made it unlawful for a person subject to the jurisdiction of the United States to (a) approach within 100 yards (91.4 m) of a humpback whale, (b) cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale, or (c) disrupt the normal behavior or prior activity of a whale. The regulations also require vessels to operate at a slow, safe speed when near a humpback whale. These regulations are set forth at 50 CFR 224.103(b) (2015). When the provisions were adopted, we cited MMPA section 112(a) and ESA section 11(f) as authority (16 U.S.C. 1382(a); 16 U.S.C. 1540(f)). However, because the humpback whale was listed as endangered throughout its range, the approach restrictions were codified only in part 224 of the ESA regulations (which applies to “Endangered Marine and Anadromous Species”).

On April 21, 2015, we proposed to revise the species-wide ESA listing of the humpback whale by recognizing fourteen distinct population segments (DPSs), two of which would be listed as endangered species (Cape Verde Islands/Northwest Africa and Arabian Sea DPSs) and two as threatened species (Western North Pacific and Central America DPSs) (80 FR 22303). In

that proposed ESA listing rule, we concluded that the remaining ten DPSs were not endangered or threatened throughout all or a significant portion of their ranges and therefore did not propose to list them. Following consideration of information received through the public comment period on the proposed ESA listing rule, including public hearings, we are separately publishing in today's issue of the **Federal Register** a final rule implementing the revised listing determinations for humpback whales. Under that ESA listing final rule, we are listing one of the fourteen DPSs as a threatened species (the Mexico DPS), and four DPSs as endangered species (the Arabian Sea DPS, the Cape Verde Islands/Northwest Africa DPS, the Central America DPS, and the Western North Pacific DPS).

As a result of the final humpback whale ESA listing rule, maintaining the Alaska approach regulations only within their the original location in the Code of Federal Regulations (CFR) is no longer appropriate. This is because, while some humpback whales that spend part of the year in Alaskan waters remain listed as endangered (those that are members of the Western North Pacific DPS), others are now listed as threatened (those that are members of the Mexico DPS) or are not listed (those that are members of the Hawaii DPS). All protections of section 9 of the ESA, including the prohibitions against "take" in 16 U.S.C. 1538(a)(1)(B)-(C), are being extended to the threatened humpback whales as part of the final ESA listing rule (50 CFR 223.213). The ESA listing reclassifications thus require recodifying the approach regulations that currently appear in part 224 (which pertains only to endangered species) so that they also appear in part 223 (which pertains to threatened species) to ensure it is clear that humpback whales listed as threatened or endangered under the ESA are protected from approach in Alaska.

Accordingly, concurrently with finalizing the humpback whale reclassification under the ESA, we are, through this final rule, recodifying the Alaska approach regulations that currently

appear in § 224.103(b) so that they also appear in § 223.214 for the protection of listed humpback whales occurring in the waters surrounding Alaska. These include whales from the Western North Pacific DPS (endangered) and Mexico DPS (threatened), as specified in the final ESA listing rule. The approach regulations have been in effect for 15 years and are important in light of the potential impacts posed by the whale watching industry, recreational boating community, and other maritime users.

In addition, we are also setting forth the Alaska approach regulations in part 216, which contains regulations regarding the taking and importing of marine mammals under the MMPA (50 CFR 216.18). Because the approach regulations were adopted in part under the authority of the MMPA, this represents a technical change only. Setting the regulations out clearly in this part of the CFR will clarify that all humpback whales that may occur in or transit through the waters surrounding Alaska are protected from approach, not just those that are ESA-listed, and reflects that the regulations were originally adopted under MMPA as well as ESA authority.

These three regulations (50 CFR 224.103(b), 223.214, and 216.18) work together to provide seamless protection to humpback whales that occur in the waters surrounding Alaska. While the ESA rules only apply to humpback whales listed as endangered or threatened species under the ESA (currently, only the Western North Pacific DPS and the Mexico DPS), the MMPA protections apply to all humpback whales in the specified geographic area (including the Hawaii DPS that is not listed). The provisions set forth under these authorities are substantively identical, so vessel operators will need to continue to exercise the same caution with regard to all humpback whales, as the current regulations have long required.

Recodifying these longstanding provisions so they appear both in 50 CFR parts 223 and 224, and setting them out clearly in part 216, represents a technical change only. The substantive

provisions and the authority for their adoption are unchanged. The only changes to the regulations as compared to the existing provisions have been technical corrections and adjustments, including:

- Inserting the word “endangered” in front of “humpback whales” in the heading and in the main sections of text of the existing ESA-based regulation in § 224.103(b) to reflect that it does not apply to all humpback whales;
- Inserting the word “threatened” in front of “humpback whales” in the heading and in the main sections of text of the new ESA-based regulation in § 223.214 to reflect that it does not apply to all humpback whales;
- Adjusting the numbering of subsections to fit the new locations in § 216.18 and § 223.214;
- Directly incorporating the description of disruption of normal behavior or prior activity of a whale from § 224.103(a)(4) (2015) (a cross-referenced provision within the approach regulations protecting whales in Hawaii, which will no longer be in effect upon finalization of the revisions to the ESA listing status of humpback whales) into the regulations in § 216.18(a)(3), § 223.214(a)(3), and § 224.103(b)(1)(iii);
- Updating language by changing “her” to “its” in the phrase “to the extent that a vessel is restricted in her ability to maneuver. . . .” in § 216.18(b)(2), § 223.214(b)(2), and § 224.103(b)(2)(ii);
- In the provisions being set out at part 216, tailoring the reference to applicable permit procedures to refer to the relevant MMPA permit procedures (which are contained in subpart D of part 216);
- In 50 CFR 224.103(b)(3), updating a reference to a safe speed rule formerly set out at 33

U.S.C. 2006. This is necessary because the safe speed rule is now set out in regulations from the Department of Homeland Security at 33 CFR 83.06. These regulations were adopted in 2010 pursuant to the Coast Guard and Maritime Transportation Authorization Act of 2004 (Pub. L. 108-293, sec. 303, 118 Stat. 1028 (2004)), which directed that such final regulations would replace sections 2001–2038 of Title 33 of the United States Code. *See* 33 U.S.C. 2071 (codifying sec. 303(b)); 75 FR 19544 (April 15, 2010), 79 FR 37898 (July 2, 2014); and

- In 50 CFR 224.103(b)(2)(vi), updating a reference to special regulations for Glacier Bay National Park and Preserve formerly set out at 36 CFR 13.65. This is necessary because the special regulations applicable within Glacier Bay National Park and Preserve, including vessel operating restrictions to protect whales, were reorganized in 2006 and are now set out in regulations from the Department of the Interior at 36 CFR 13.1102 - 13.1188. *See* 71 FR 69328 (Nov. 30, 2006).

We solicited public comments in the proposed ESA listing rule (80 FR 22303, April 21, 2015) regarding relocation of the Alaska approach regulations. *See* 80 FR at 22354. At the time of the proposed listing rule, we did not expect that there would be any endangered DPSs present in Alaska and so sought comment as to whether we should relocate them from part 224 to part 223 (setting out ESA regulations applicable to “Threatened Marine and Anadromous Species”) and also as to whether we should set them out in part 216 as MMPA regulations. Because we are now listing the Western North Pacific DPS as endangered, we will retain the approach regulations under the ESA at 50 CFR 224.103, and because we are listing the Mexico DPS as threatened, we will also add the provisions to part 223 at 50 CFR 223.214.

The State of Alaska was the only commenter that specifically addressed approach regulations in Alaska. The State supported retaining approach regulations in U.S. waters in Alaska because of the conservation benefits to ESA-listed and non-listed humpback whales that frequent Alaska waters. We therefore promulgate a final rule effecting a technical correction and recodification that recodifies these provisions so that they appear in both parts 223 and 224 and also setting the provisions out in part 216 (MMPA Regulations) at 50 CFR 216.18, to reflect that these provisions were originally adopted under the MMPA as well as the ESA and are an important source of protection for these marine mammals.

### **Classification**

NMFS finds that good cause exists, under the Administrative Procedure Act, for adopting these rule changes as a final rule without stand-alone public notice and comment. *See* 5 U.S.C. 553(b)(B). As noted above, public comments on this action were solicited in the proposed ESA listing rule (80 FR 22303, April 21, 2015) and have been fully considered both for this technical regulation and in the context of the development of the final ESA listing rule. We find that additional notice and public procedure on this technical final rule is unnecessary because no substantive modifications are being made to the regulations being recodified so that they appear both in 50 CFR part 224 and 50 CFR part 223 and set out in 50 CFR part 216. All of the changes are technical, including the change to the language at § 224.103(b)(1)(iii) (which now sets out a definition directly in the text that was previously cross-referenced, as noted above). Consequently, the final rule does not alter the rights or responsibilities of any party. Additionally, delaying implementation of this rule for a separate public notice and comment period would be contrary to the public interest because it would create a lapse in necessary protections for the humpback whales that transit through Alaskan waters.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, NMFS has not submitted any information to the Office of Management and Budget for review.

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. This action affects owner-operator whale watch businesses, eco-tourism companies (mostly local kayak tour businesses), and owner-operator fishing enterprises.

This action is a technical change to update the provisions and recodify them so they appear at both 50 CFR part 224 (which applies to “Endangered Marine and Anadromous Species”) and 50 CFR part 223 (which applies to “Threatened Marine and Anadromous Species”). Additionally, when the Alaska provisions were adopted, we cited section 112(a) of the MMPA in addition to section 11(f) of the ESA as authority (16 U.S.C. 1382(a); 16 U.S.C. 1540(f)). However, because the humpback whale was listed throughout its range as endangered, the rule was codified only in part 224. Setting out the regulations in a new section, § 223.214, is necessary in order to continue the protection of threatened humpback whales, in addition to the endangered humpback whales, in Alaska. We are also setting out these provisions in 50 CFR part 216, for the protection of all humpback whales that may occur or transit through the waters surrounding Alaska, to reflect that these provisions were adopted under the MMPA as well as the ESA and are an important source of protection for these marine mammals. These provisions have



been in effect for 15 years and are important in light of the potential impacts posed by the whalewatching industry, recreational boating community, and other maritime users. These provisions are merely being recodified within the CFR to continue existing protections in light of revisions to the ESA listing status of humpback whales.

Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

NMFS analyzed this rule under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and NOAA's Administrative Orders (NAO) 216-6A and 216-6. NMFS determined that this action satisfies the standards for reliance upon a categorical exclusion under NAO 216-6 § 6.03c.3(i) for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” NAO 216-6, § 6.03c.3(i). The rule would not trigger an exception precluding reliance on the categorical exclusion because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. *Id.* § 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. In addition, NMFS finds that because this rule will not result in any effects to the physical environment, much less any adverse effects, there would be no need to prepare an Environmental Assessment even aside from consideration of the categorical exclusion. *See Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029 (N.D. Cal. 2013). Issuance of this rule does not alter the legal and regulatory status quo in such a

way as to create any environmental effects. *See Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d. 8, 29 (D.D.C. 2007).

## **List of Subjects**

### *50 CFR Part 216*

Administrative practice and procedure, Marine mammals.

### *50 CFR Part 223*

Threatened marine and anadromous species.

### *50 CFR Part 224*

Endangered marine and anadromous species.

Dated: August 30, 2016.

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Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 216, 223, and 224 are amended as follows:

## **PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. In subpart B of part 216, add § 216.18 to read as follows:

**§ 216.18 Approaching humpback whales in Alaska.**

(a) *Prohibitions.* Except as provided under paragraph (b) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (a)(1) through (a)(3) of this section with respect to humpback whales (*Megaptera novaeangliae*):

(1) Approach, by any means, including by interception (i.e., placing a vessel in the path of an oncoming humpback whale so that the whale surfaces within 100 yards (91.4 m) of the vessel), within 100 yards (91.4 m) of any humpback whale;

(2) Cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale; or

(3) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

(b) *Exceptions.* The following exceptions apply, but any person who claims the applicability of an exception has the burden of proving that the exception applies:

(1) Paragraph (a) of this section does not apply if an approach is authorized by the National Marine Fisheries Service through a permit issued under subpart D of this part (Special

Exceptions) or through a similar authorization.

(2) Paragraph (a) of this section does not apply to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply with paragraph (a) of this section.

(3) Paragraph (a) of this section does not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this section, commercial fishing means taking or harvesting fish or fishery resources to sell, barter, or trade. Commercial fishing does not include commercial passenger fishing operations (i.e., charter operations or sport fishing activities).

(4) Paragraph (a) of this section does not apply to state, local, or Federal government vessels operating in the course of official duty.

(5) Paragraph (a) of this section does not affect the rights of Alaska Natives under 16 U.S.C. 1539(e).

(6) This section shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.1102-13.1188 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(c) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (a) and (b) of this section, to avoid collisions with humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. “Safe speed” has the same meaning as the term is defined in 33 CFR 83.06 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602), with respect to avoiding collisions with humpback whales.

## **PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

3. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531-1543; subpart B, § 223.201-202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

4. In subpart B of part 223, add § 223.214 to read as follows:

**§ 223.214 Approaching threatened humpback whales in Alaska.**

(a) *Prohibitions.* Except as provided under paragraph (b) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (a)(1) through (a)(3) of this section with respect to threatened humpback whales (*Megaptera novaeangliae*):

(1) Approach, by any means, including by interception (i.e., placing a vessel in the path of an oncoming humpback whale so that the whale surfaces within 100 yards (91.4 m) of the vessel), within 100 yards (91.4 m) of any humpback whale;

(2) Cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale; or

(3) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

(b) *Exceptions.* The following exceptions apply, but any person who claims the

applicability of an exception has the burden of proving that the exception applies:

(1) Paragraph (a) of this section does not apply if an approach is authorized by the National Marine Fisheries Service through a permit issued under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(2) Paragraph (a) of this section does not apply to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply with paragraph (a) of this section.

(3) Paragraph (a) of this section does not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this section, commercial fishing means taking or harvesting fish or fishery resources to sell, barter, or trade. Commercial fishing does not include commercial passenger fishing operations (i.e. charter operations or sport fishing activities).

(4) Paragraph (a) of this section does not apply to state, local, or Federal government vessels operating in the course of official duty.

(5) Paragraph (a) of this section does not affect the rights of Alaska Natives under 16 U.S.C. 1539(e).

(6) This section shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.1102-13.1188 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(c) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (a) and (b) of this section, to avoid collisions with threatened humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. “Safe speed” has the same meaning as the term is defined in 33 CFR 83.06 and the International Regulations for Preventing

Collisions at Sea 1972 (see 33 U.S.C. 1602), with respect to avoiding collisions with humpback whales.

## **PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES**

5. The authority citation for part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531-1543 and 16 U.S.C. 1361 *et seq.*

6. Amend § 224.103 to revise the heading of paragraph (b), and paragraphs (b)(1) introductory text, (b)(1)(iii), (b)(2)(ii), (b)(2)(vi), and (b)(3) to read as follows:

### **§ 224.103 Special prohibitions for endangered marine mammals.**

\* \* \* \* \*

(b) *Approaching endangered humpback whales in Alaska—(1) Prohibitions.* Except as provided under paragraph (b)(2) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (b)(1)(i) through (b)(1)(iii) of this section with respect to endangered humpback whales (*Megaptera novaeangliae*):

\* \* \* \* \*

(iii) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously

frequented area.

(2) \* \* \*

(ii) Paragraph (b)(1) of this section does not apply to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply with paragraph (b)(1) of this section.

\* \* \* \* \*

(vi) Paragraph (b) of this section shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.1102-13.1188 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(3) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (b)(1) and (2) of this section, to avoid collisions with endangered humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. “Safe speed” has the same meaning as the term is defined in 33 CFR 83.06 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602) with respect to avoiding collisions with humpback whales.

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